

THE HON'BLE SRI JUSTICE GODA RAGHURAM

WRIT PETITION NO. 17550 OF 2005

22nd DAY OF AUGUST, 2005

Between:

M/s Alluminum Industries Limited, Lingampalli, Hyderabad,
Rep. by its Personnel Officer.

Petitioner

A n d :

Employees State Insurance Corporation,
Rep. by its Regional Director, Hyderabad and another

Respondents

The court, at the stage of admission, made the following:

:: ORDER ::

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The petitioner is a Public Limited Company, which was engaged in the manufacture of Wire Drawing Machines. It became a sick industry in the early 80's. The company

was referred u/Sec. 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (for short 'the Act') to the Board of Industrial and Financial Reconstruction (BIFR) in 1985 and the reference was registered by the BIFR as 93/87. In 1989 a scheme for rehabilitation of the petitioner was formulated. The scheme however failed. The BIFR is however again pursuing efforts for the petitioner's rehabilitation. According to the petitioner even the salaries of its employees were not paid for over 3½ years on account of the very critical financial condition of the company. Admittedly even the Employees' State Insurance (ESI) and the Provident Fund (PF) contributions were not remitted.

In September 2000 the 1st respondent determined the liability of the petitioner towards ESI dues in an amount of Rs.6.5 lakhs and intimated the petitioner that the amount be paid by 13.9.2000, failing which criminal action would be initiated against the petitioner's Company and its management. Questioning this action the petitioner filed W.P. No. 17207 of 2000 and by the order of this court dated 25.2.2002 obtained an interim stay of all further proceedings.

The respondents issued another proceedings dated 28.3.2003 demanding an amount of Rs.17,93,060/- towards the contribution for the period 1.4.2000 to 31.10.2002. The Recovery Officer of the respondent also issued a consequent notice dated 1.4.2003 intimating that coercive steps would be taken against the petitioner and its management unless the amounts specified in the proceedings dated 28.3.2003 are paid within the stipulated time. These proceedings were also challenged in W.P.No. 7123 of 2003. By an order of this court dated 22.4.2003 an interim stay of prosecution or of recovery proceedings against the petitioner, pursuant to the Recovery Officer's notice dated 1.4.2003, was granted.

The 2nd respondent has now issued the impugned demand notice for recovery of an amount of Rs.15,52,114/- towards arrears of ESI contribution for the period 1.11.2002 to 31.12.2004; interest u/Sec. 39(5)(a) upto 31.5.2005 and damages u/Sec.85(B) of the Employees' State Insurance Act, 1948 (for short 'the ESI Act').

The impugned notice issued by the 2nd respondent intimated the petitioner-Company that in addition to the specified amounts, the petitioner would also be liable for interest apart from costs and charges incurred for initiating the proceedings for realizing the arrears.

The petitioner challenges the above action of the 2nd respondent and pleads that as proceedings are pending before BIFR and a meeting also took place on 26.7.2005 before the BIFR, the provisions of Sec.22 of the Act are applicable to the petitioner and no proceedings for recovery of ESI dues could be maintained. Another contention of the petitioner is that its liability to pay the ESI dues is contingent on its payment of salaries to its employees from which the ESI contribution has to be deducted and paid to the ESI Corporation and since the salaries were not paid on account of the financial status of the petitioner company, the petitioner cannot be proceeded against for non remittance of the ESI dues or for arrears and damages in this behalf.

At the hearing Mr. V.Srinivas, learned counsel for the petitioner reiterated the same contentions as above. Mr. R.N.Reddy, learned Standing Counsel for the respondents resisted the petitioner's claim and contended that the petitioner's liability to PF and ESI dues and the consequences for default in remittance of these contributions is not immunised u/Sec. 22 of the Act. Mr. Reddy also contended that the petitioner was under an initial obligation to pay the ESI contributions to the ESI Corporation, that this obligation is irrespective of whether the wages have been paid.

Earlier to the impugned notice of the 2nd respondent, the 1st respondent by the proceedings dated 19.5.2005 intimated the petitioner that it had failed to pay the contributions for the period 1.11.2002 to 31.12.2004 as pointed out in the inspection report dated 18.2.2005 and that the arrears payable by the petitioner for this period amounts to Rs.12,80,976.30 ps, that these amounts are recoverable under the provisions of the ESI Act and with interest as per the statutory provisions and that failure of the petitioner would invite appropriate action under the ESI Act for prosecution and damages. Responding to the above proceedings the petitioner addressed a letter dated 16.6.2005 stating that it is facing acute shortage of funds and therefore is not in a position to remit the amounts, that these dues are part of the BIFR package and would be paid after a promoter steps in and funds are available. The petitioner also stated in this letter that a rehabilitation scheme is likely to be in place for rehabilitation of the petitioner's company.

The question is whether the petitioner enjoys any immunity from recovery of the ESI dues on account of the pendency of the petitioner's case for rehabilitation before the

BIFR and in view of the provisions of Sec.22 of the Act. Sec.22 of the Act reads as under:

“22. Suspension of legal proceedings, contracts etc.:- (1) Where in respect of an industrial company, an enquiry under Section 16 is pending or any scheme referred to under Section 17 is under preparation or consideration or a sanctioned scheme is under implementation or where an appeal under Section 25 relating to an industrial company is pending, then notwithstanding anything contained in the Companies Act, 1956 (1 of 1956) or any other law or the Memorandum and Articles of Association of the Industrial company or any other instrument having effect under the said Act or other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company or for the appointment of a receiver in respect thereof and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans, or advance granted to the industrial company shall lie or be proceeded with further, except with the consent of the Board or, as the case may be, the Appellate Authority.”

Whether the over-riding effect given to the provisions of the Act and in the circumstances specified in Sec.22 operate even in respect of the amounts payable under the ESI Act requires to be considered.

A learned single Judge of the Bombay High Court (Dr. D.Y.Chandrachud,J) in a judgment in ***Ralliwolf Ltd., v The Regional Provident Fund Commissioner-I, Thane and others ()***, considered a similar contention of the petitioner Company in that case in respect of the contributions payable under the Employees' Provident Funds and Miscellaneous Provisions Act 1952 (for short 'the EPF Act') in the context of the said company also having been referred to the BIFR and having been declared sick with a rehabilitation proposal under consideration. On a painstaking and meticulous analyses of several precedents and the underlying purposes of the provisions of the Act and of the EPF Act, the Bombay High Court came to the conclusion that the object of Sec.22 of the Act was to ensure that the attempts at revival of a sick industrial company are not rendered nugatory by predatory creditors nibbling away at the capital and other assets of the industrial company which is being revived; that no construction should be put on the provisions of Sec. 22 of the Act which would enable exploitation of the employees; that the provisions of Sec.22 would not immunize the liability of a company to pay wages to its workmen and that for reasons and principles alike the employer's obligation to pay the contribution of the employees as well as its own contribution under the EPF Act is in no way eclipsed

by the provisions of Sec.22 of the Act. An identical view was taken by a Division Bench of this court in ***M/s Sarvaraya Textiles Ltd., v The Commissioner, Employees' Provident Fund Commission and others*** – W.A. No. 1395 of 2001, by the judgment dated 8.11.2001.

In view of the ratio enunciated in the above decisions, in particular the decision of the Division Bench of this court in ***M/s Sarvaraya Textiles***, the petitioner's contention that in view of a reference of the petitioner company to the BIFR, the petitioner's liability for non-payment of ESI contributions cannot be enforced against it, cannot be accepted and the petitioner enjoys no immunity under the provisions of Sec.22 of the Act for dues of contributions to the ESI Corporation.

The other contention of the petitioner is that as it has not paid even the wages to its employees, it is not liable to pay the ESI contributions either and the liability to pay these contributions is contingent upon payment of wages to its employees. This is a contention, which is stated to be rejected. Sec. 40 of the ESI Act ordains that the principal employer shall pay, in respect of every employee, whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution. The principal liability to pay both the contributions of the employer and the employee are therefore at the first instance on the employer. Considering a similar legislative scheme under the EPF Act a Division Bench of the Kerala High Court in ***Calicut Modern Spinning & Weaving Mills Ltd., v Regional Provident Fund Commissioner ()*** held that it is the employer's obligation and liability to pay the contributions voluntarily every month irrespective of the fact whether wages have been paid or not and that the initial obligation to pay the contribution is because the measure (under the EPF Act) was enacted for the support of the working class and was intended to keep the Provident Fund vibrant and operational for the purpose for which the fund has been created, lest the neglect of the employer should deplete the fund and enable him to divert the monies for alien purposes. The Kerala Division Bench also expressed the view that to allow the employer to make the contribution only when he pays wages, would result in stultification of the legislative scheme under the EPF Act as the employer would in such circumstances be enabled to divert the remittances payable to the Fund to suit his convenience and/or for other purposes.

This court is in respectful agreement with the ratio enunciated by the Division Bench of the Kerala High Court in the above case.

This court accordingly holds that in principle, on authority and in view of the provisions of Sec. 40 of the ESI Act the petitioner Company is liable to pay the ESI contributions irrespective of the fact whether wages have been paid to its employees or not.

On the aforesaid analysis this court finds no merits in the writ petition. The writ petition is accordingly dismissed at the stage of admission. No order as to costs.

Dated: 22-08-2005 -----

Pvsn Justice G. Raghuram